

The Genesis of Guidance

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Workshop 6

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Craig is the General Counsel for the American Retirement Association (ARA). Craig has previously served ARA as President of its predecessor, the American Society of Pension Professionals & Actuaries, Co-chair of the Government Affairs Committee and Co-chair of the Political Action Committee. Prior to joining ARA, Craig served as General Counsel for SunGard Relius LLC, and before that, was in private practice, specializing in the areas of taxation, ERISA, and employee benefits. He received his BSBA degree (with high honors), his J.D. degree (with honors), and his LL.M. in Taxation degree all from the University of Florida. Craig has spoken at numerous meetings on the subject of qualified pension and retirement plans and was an expert speaker at the first Saver Summit, jointly sponsored by the White House and Congress. Presently, Craig serves on the editorial boards of the Journal of Pension Benefits (Panel Publishers) and the Journal of Pensions Management (Henry Stewart Publications). He was a charter member of the first IRS Advisory Committee on Tax Exempt and Governmental Entities. He is also a Fellow in the American College of Employee Benefits Counsel.



What We Will Cover

- In the Beginning, There Was the Constitution and Congress
- The Constraints on Regulatory Authority
- Regulators with Jurisdiction Over Qualified Plans
- Agency Structure
- Types of Guidance

Congress

Constitution

- Federal agencies are part of the President's executive branch and can exercise regulatory authority under an express grant from Congress or the powers granted to the President by the Constitution.

Congress

- Generally, the starting point for the exercise of regulatory authority is an underlying “bill” passed by both Houses of Congress and signed into law by the President.



Congress

- The issuance of a regulations or other guidance is referred to as “rulemaking.”
- Congress limits the exercise of regulatory authority in a number of ways.

Congress

- The main law that governs how federal agencies issue rules and regulations is the Administrative Procedures Act (APA) which was originally enacted in 1946 and has been amended many times since then.



The APA was passed after 10 years of deliberation. It was largely a response to president franklin Roosevelt's creation of a number of new federal agencies. The APA was intended by Congress to regulate and limit agency power.

Regulatory Constraints

The APA

- The purposes of the APA are:
 - To keep the public informed on the regulatory actions being taken by federal agencies;
 - To allow for public comment and participation in the rulemaking process;
 - To set formal standards for how the rulemaking process is conducted;
 - To provide a process for judicial review under certain circumstances.

The APA

- The APA applies to “rulemaking.”
- A “rule” is a formal proclamation by a federal agency which is “designed to implement, interpret, or prescribe law or policy...”.

“Rules” generally are issued as regulations that are published in the Code of Federal Regulations.

Informal guidance such as booklets, FAQs, etc. is referred to as “subregulatory guidance” because it is not a “rule” and not subject to the constraints of the APA and similar laws.

The APA

- A federal agency may decide to issue a rule:
 - on its own initiative;
 - as the result of a “Petition for Rulemaking” from a member of the public; or
 - at the direction of Congress.

The APA

- Agencies often take preliminary steps to gather input from the public even before proposing a rule.
 - Examples:
 - A Request for Information (RFI) was issued by the Treasury and DOL with respect to the ongoing initiatives to encourage the use of lifetime income distribution alternatives.
 - An Advanced Notice of Proposed Rulemaking (ANPR) was issued by the DOL with respect to an equivalent lifetime income calculation for DC plan benefit statements.

The APA

- The APA normally requires that before a federal agency can formally adopt a rule/regulation, it must:
 - Give “notice” of what it intends to do, typically through publication of a proposed regulation in the federal register;
 - Provide an opportunity for the public to provide input on the proposal through written comments and/or a public hearing; and
 - Publish a final regulation (again in the Federal Register) after giving due consideration to the comments it received.



Failure to follow the requisite procedures can result in a regulation being invalidated through a legal challenge in the courts.

Other Constraints

- The Paperwork Reduction Act of 1980 (PRA) requires federal agencies to follow certain procedures before implementing a rule that will impose an information collection burden on the general public. For example, Form 5500 and other IRS tax forms are subject to this rule.



Compliance with the PRA is overseen by the Office of Management and Budget (OMB) which is an arm of the White House charged with coordinating all federal rulemaking.

Other Constraints

- The Regulatory Flexibility Act of 1980 (RFA) requires federal agencies to consider the impact of “significant” regulations on small businesses, small non-profits and small governmental entities.



If applicable, the RFA requires agencies to seek comment from small businesses, the Small Business Administration Office of Advocacy and other affected entities before issuing a rule.

A flexibility analysis must be done that considers less burdensome regulatory alternatives.

Other Constraints

- The Congressional Review Act, enacted in 1996, gives Congress the power to review a newly issued regulation and “disapprove” it.
- This “disapproval” will prevent the regulation from going into effect but the President has the right to veto the resolution.



The resolution of disapproval, however, must be passed by Congress and signed into law by the President, which rarely happens, or enacted over the President’s veto by a two-thirds vote of both Houses of Congress (also rare).

Regulatory Agencies With Jurisdiction Over Retirement Plans

Regulatory Agencies

- The regulation of retirement plans is largely under the auspices of two distinct areas of law.
- Historically, retirement plans have been required to satisfy certain requirements imbedded in the Internal Revenue Code in order to “qualify” for favorable tax treatment.
- In 1974, Congress enacted the Employee Retirement Income Security Act (ERISA) to add labor law regulation of non-governmental, employer sponsored retirement plans.



The primary benefit of being a tax “qualified” retirement plan is that employer contributions are deductible immediately as a business expense even though participants do not have to recognize the contributions as taxable income until they are distributed (if not rolled over to an IRA).

Regulatory Agencies

- As a result of the enactment of ERISA, the two primary federal agencies with jurisdiction to regulate retirement plans are the Department of Labor (DOL) and the Treasury Department (which includes the Internal Revenue Service (IRS)).
- ERISA added many new requirements that are mirrored in both the labor laws and the tax code.



A 1978 Presidential Executive Order divided ERISA regulatory jurisdiction between Treasury and DOL.

The IRS has principal authority over coverage, vesting and funding issues. The DOL has primary authority over reporting, disclosure, fiduciary matters and prohibited transactions.

Regulatory Agencies

- ERISA also created the Pension Benefits Guaranty Corporation (PBGC), an independent agency of the federal government.
- The PBGC collects “premiums” from the sponsors of defined benefit plans and provides a level of “insurance” that guarantees the payment of at least some portion of the benefits promised under a covered defined benefit plan.
- As such, the PBGC has jurisdiction to issue regulations in furtherance of this mission.

Regulatory Agencies

- Other federal regulatory authorities that have issued regulations potentially impacting retirement plans include:
 - The Securities Exchange Commission (SEC), which has authority to issue regulations relating to the securities industry and the nation's stock exchanges.
 - The U.S. Comptroller of the Currency, which has authority to regulate national banks.

Agency Structure



DOL Structure

- The DOL has wide ranging jurisdiction (emanating from the U.S. labor laws) to regulate things such as collective bargaining between unions and employers, workplace safety and minimum wage laws.
- The division of the DOL that regulates private sector retirement plans is the Employee Benefits Security Administration (EBSA) headed by Assistant Secretary Phyllis Borzi.



The EBSA was previously known as the Pension and Welfare Benefits Administration. The name was changed in 2003 when the office was upgraded to a sub-cabinet position and the office of Assistant Secretary was created.

Treasury/IRS Structure

- The Internal Revenue Code is administered in a much more complicated fashion.
- Ultimately, the Treasury Department has jurisdiction over the tax code.
- The Internal Revenue Service, however, is a bureau of the Treasury Department with responsibility for administering (and enforcing) the tax code and the collection of taxes.

Treasury/IRS Structure

- Within the Treasury Department, the Office of Tax Policy includes a Deputy Assistant Secretary for Retirement and Health Policy who has jurisdiction over tax issues relating to retirement savings, health care and employee benefits.
- The Office of Benefits Tax Counsel (within the Treasury Department) develops and reviews regulations and other guidance relating to these same issues.

Treasury/IRS Structure

- Within the IRS, the Tax Exempt and Governmental Entities Division (TEGE) includes the Employee Plans Office (EP) that is responsible for ensuring compliance with the tax laws that relate to retirement plans.
- The IRS lawyers are part of the Chief Counsel's Office which includes the Office of the Associate Chief Counsel-TEGE which is responsible for providing legal guidance and interpretive advice to the IRS.

EP Reorganization

- On January 1, 2015, the IRS transferred responsibility for certain technical work from the Employee Plans Division to the IRS Chief Counsel's Office.
- The purpose was to align responsibilities at the TE/GE division in a way that matches up with the structure followed by the other three IRS operating divisions.

The other 3 operating divisions are: Wage and Investment division; large Business and International Division; and Small Business/Self Employed Division.

EP Reorganization

- IRS Announcement 2014-34 indicates that the responsibility for preparing revenue rulings, revenue procedures and other forms of guidance was moved from the TE/GE division to the IRS Chief Counsel's Office effective January 1, 2015.

- This is in keeping with that Office's primary function to provide legal advice on the interpretation of the tax laws.
- Until this realignment, the lawyers who worked within the TE/GE division provided many of these interpretations.

IRS Reorganization

- ASPPA's Government Affairs Committee has enjoyed a good working relationship with the Chief Counsel lawyers who work on qualified plan issues.
- The meetings we have had with the IRS over the years have included representatives from TE/GE, the Chief Counsel's Office as well as from the Treasury Department since qualified retirement plan guidance has been a product of this "team."



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At our last IRS meeting, ASPPA GAC was assured that the realignment would not result in any diminution in our good relations with the "team."

The Types of Guidance



DOL Guidance

- The DOL issues guidance in the following formats:
 - Regulations (subject to APA)
 - Advisory Opinions (sub regulatory)
 - Field Assistance Bulletins (sub regulatory)
 - Prohibited Transaction Exemptions (sub regulatory)
 - Information Letters (sub regulatory)
 - Technical Releases (sub regulatory)

Treasury/IRS Guidance

- The Treasury/ IRS issues guidance in the following formats:
 - Regulations (subject to APA)
 - Revenue Rulings (sub regulatory)
 - Revenue Procedures (sub regulatory)
 - Private Letter Rulings (sub regulatory)
 - IRS Notices (sub regulatory)
 - IRS Announcements (sub regulatory)



QUESTIONS???